

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OCTAVIO SANDOVAL,)	
)	No. CV-08-0041-CI
Plaintiff,)	
)	ORDER DENYING DEFENDANT'S
v.)	MOTION TO DISMISS AND
)	REMANDING CASE TO APPEALS
MICHAEL J. ASTRUE,)	COUNCIL FOR REVIEW PURSUANT TO
Commissioner of Social)	20 C.F.R. § 404.967
Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT is Plaintiff's Complaint (Ct. Rec. 4) and Defendant's Motion to Dismiss for lack of jurisdiction (Ct. Rec. 11), noted for hearing without oral argument on May 22, 2008. Attorney Robyn L. Pugsley represents Plaintiff; Special Assistant United States Attorney David Burdett represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 10.) In support of his Motion, Defendant has filed briefing and the Declaration of Dennis Ford, Acting Chief of Court Case Preparation and Review with exhibits. (Ct. Rec. 12, 13.) Plaintiff responded to the Motion with briefing and exhibits. (Ct. Rec. 16.) After reviewing the file, the court **DENIES** Defendant's Motion to Dismiss, finds jurisdiction under 28 U.S.C. § 1361, and remands the case to the Appeals Council for review pursuant to 20 C.F.R. §§

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND REMANDING
CASE TO APPEALS COUNCIL FOR REVIEW - 1

1 404.967, .968.

2 **BACKGROUND**

3 Plaintiff filed an application for disability benefits under
4 Title II on August 20, 2004. On July 16, 2007, an administrative
5 law judge (ALJ) issued an unfavorable decision and denied benefits.
6 A copy of the decision was sent to Plaintiff's representative on
7 July 16, 2007, with a cover letter explaining that if Plaintiff
8 disagreed with the decision, review by the Appeals Council must
9 requested within 60 days from date of receipt of the decision.
10 Plaintiff was instructed that he could file his request at a local
11 Social Security office or a hearing office, or mail it to the
12 Appeals Council in Falls Church, Virginia. (Ct. Rec. 16, Att. 2.)

13 On November 9, 2007, the Appeals Council received, via
14 facsimile message, a request for extension for time to file a brief
15 and "a second copy of the Claimant's Request for Review that was
16 timely mailed on September 4, 2007" from Plaintiff's representative.
17 (Ct. Rec. 13, Ford Decl., Exhibit 2) On December 6, 2007, the
18 Appeals Council sent Plaintiff a notice that his request for review
19 had been dismissed as untimely filed, and there was no good cause
20 shown for extending the deadline for filing. (Ct. Rec. 16, Att. 8.)

21 On February 4, 2008, Plaintiff filed a Complaint, asking this
22 court to remand his case to the Appeals Council for review. (Ct.
23 Rec. 1, 4.) Plaintiff argues the Request for Review was filed when
24 it was mailed, and supports his argument with documentary evidence
25 and sworn Affidavit of Robyn L. Franz, registered paralegal for
26 Plaintiff's counsel. (Ct. Rec. 16, Att. 12, Franz Aff.) Ms. Franz
27 states under oath that she deposited in the United States Mail
28 repository a signed Request for Review and cover letter, with proper

1 postage, addressed to the local Social Security Office, E. 811
2 Sprague Ave., Ste. A, Spokane, WA. (*Id.* at 2-3.) She states the
3 letter mailed was not returned to the representative's office. (*Id.*)
4 Ms. Franz further states she contacted the Social Security Office on
5 November 8, 2007, to follow up on counsel's requested extension of
6 time to file a brief and discovered that neither the local Social
7 Security Office nor the Spokane Office of Disability Adjudication
8 and Review had record of Plaintiff's Request for Review in its data
9 base. She was advised to call the Appeals Council. (*Id.* at 3-4.)
10 The Appeals Council representative told her the September 4, 2007,
11 Request for Review was not in their records, and asked Ms. Franz to
12 fax copies of the September 4, 2007, correspondence. Ms. Franz
13 faxed the correspondence (which is also included in the court file)
14 on November 9, 2007. (Ct. Rec. 13, Att. 2, Ford Decl. at Exhibit 2;
15 Ct. Rec. 16, Att. 12, Franz Aff. at 1-4.)

16 The record indicates Plaintiff's submissions were considered by
17 the Appeals Council, along with Plaintiff's request for an
18 additional extension of time to file a supporting brief. The
19 Appeals Council found no good cause to extend the time for filing
20 and dismissed Plaintiff's Request for Review on December 6, 2007.
21 (Ct. Rec. 13, Att. 2, Ford Decl. at Exhibit 3.) Plaintiff's request
22 to the Appeals Council that the dismissal be vacated was denied on
23 January 25, 2008. (Ct. Rec. 16, Att. 12, Franz Aff. at 6.)

24 On May 13, 2008, Plaintiff filed a Complaint requesting this
25 court remand his Social Security case to the Appeals Council for
26 review. He also requests attorney fees pursuant to the Equal Access
27 to Justice Act, 28 U.S.C. §2412(d). (Ct. Rec. 1, 4.) Defendant
28 moves to dismiss review of this action, contending Plaintiff failed

1 to exhaust his administrative remedies and there is no "final
2 decision" following a hearing required to establish subject-matter
3 jurisdiction under 42 U.S.C. § 405(g). Defendant also contends
4 Plaintiff's claim is not collateral to his claim for benefits and,
5 therefore, waiver of the exhaustion requirement is not available.
6 (Ct. Rec. 12.) In his response to Defendant's Motion to Dismiss,
7 Plaintiff argues he has met the requirements for waiver of the
8 exhaustion requirement. In the alternative, he invokes the "mailbox
9 rule," asserting that he has provided proof that his Request for
10 Review was mailed on September 4, 2007, an allegation that creates
11 the rebuttable presumption that it reached the Social Security
12 within the 60-day time limit. He contends the court has mandamus
13 jurisdiction under 28 U.S.C. § 1361.

14 Upon receipt of Plaintiff's response raising the issues of
15 waiver of the exhaustion requirement and mandamus jurisdiction under
16 § 1361, the court directed Defendant to supplement the record with
17 additional briefing to address these issues as they relate to the
18 facts before the court. Defendant filed supplemental briefing on
19 mandamus jurisdiction under 28 U.S.C. § 1361, contending the
20 exhaustion of administrative remedies is a prerequisite to mandamus
21 jurisdiction. Defendant does not challenge Plaintiff's assertion
22 that he meets the waiver of exhaustion requirements, and does not
23 controvert Plaintiff's evidence of timely filing by mailing within
24 the 60 days after receipt of the ALJ's decision. (Ct. Rec. 18.) In
25 his reply to Defendant's Response to the court's Order, Plaintiff
26 reiterates his argument that mandamus jurisdiction is proper, and
27 requests that the court remand his claim to the Appeals Council.
28 (Ct. Rec. 19.)

DISCUSSION

Under regulations promulgated by the Social Security Administration (Regulations), if a Social Security claimant is dissatisfied with an ALJ decision, the claimant can request review by the Appeals Council. A request for review must be filed within 60 days after the date the claimant receives notice of the ALJ's decision. 20 C.F.R. §§ 404.967, .968. "The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge." 20 C.F.R. §404.967. The Appeals Council will dismiss a request for review if filing was untimely and the time for filing has not been extended. 20 C.F.R. § 404.971.

A. Exhaustion of Administrative Remedies

Sections 405(g) and (h) of the Social Security Act require that prior to judicial review of a decision by the Commissioner, a claimant must (1) present his claim to the agency, and (2) exhaust his administrative remedies, and obtain a "final decision . . . made after a hearing." 42 U.S.C. § 405(g), (h); *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The requirement to present a claim to the Commissioner is non-waivable. *Heckler v. Ringer*, 466 U.S. 602, 617 (1984). It is well settled that "the requirement that a claimant appeal an adverse decision within 60 days" is waivable by the Commissioner or the courts. As such, the requirement is not jurisdictional. *Johnson v. Shalala*, 2 F.3d 918, 923 (9th Cir. 1993) (citing *Bowen v. City of New York*, 476 U.S. 467, 481 (1986)). However, waiver of the exhaustion requirement of 405(g) is available only where a claim is "(1) collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that

1 denial of relief will cause irreparable harm (irreparability), and
2 (3) one whose resolution would not serve the purposes of exhaustion
3 (futility)." *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir 2003)
4 (*quoting Johnson*, 2 F.3d at 921).

5 In his response, Defendant does not challenge the sufficiency
6 of Plaintiff's allegations he has met the requirements for waiver of
7 the exhaustion requirement. (Ct. Rec. 16 at 7; Ct. Rec. 18.) The
8 court may interpret this as agreement that waiver requirements are
9 met. *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975).

10 In the alternative to the waiver of exhaustion requirements
11 argument, Plaintiff invokes the "mail box rule" and argues he has
12 presented evidence of timely filing by mail. He contends the
13 Appeals Council erroneously refused to review his case, and asks the
14 court to assume mandamus jurisdiction and order remand for review.
15 (Ct. Rec. 16 at 8-13.)

16 **A. Common Law "Mailbox Rule"**

17 The common law "mailbox rule" raises a presumption of mail
18 receipt unless the intended recipient can rebut the presumption by
19 producing credible, probative evidence of non-receipt. *Schikore v.*
20 *BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, (9th Cir.
21 2001) (mailbox rule applies in context of ERISA claims). In
22 *Schikore*, the court held that allowing the employer's ERISA plan to
23 rebut the employee claimant's presumption "simply on the basis that
24 the records office now cannot find the document, although there is
25 evidence of mailing," was inconsistent with ERISA's purpose to
26 protect employee rights. *Id.* at 694. Likewise, allowing the
27 Commissioner's simple denial of receipt by the Social Security
28 Administration to rebut the presumption of receipt of a request for

1 review (see Ct. Rec. 12 at 2), is inconsistent with the agency's
2 purpose to assist the disabled. See *City of New York*, 476 U.S. at
3 480 (Social Security Act is a statute "that Congress designed to be
4 'unusually protective' of claimants") (citing *Heckler v. Day*, 467
5 U.S. 104, 106 (1984)); see also *Anderson v. United States*, 966 F.2d
6 487, 492 (9th Cir. 1992) (IRS did not rebut presumption of timely
7 receipt with evidence that agency did not receive taxpayer's
8 return). Further, as noted by the Second Circuit, the
9 Commissioner's form notice letter instructs a claimant that filing
10 a request for review may be accomplished by "sending a letter,
11 requesting review, directly to the Appeals Council." (Ct. Rec. 16,
12 Att. 2, "Notice of Decision-Unfavorable".) Thus, mailing, by the
13 Commissioner's own interpretation, is an acceptable method of
14 filing. *Dietsch v. Schweikder*, 700 F.2d 865, 868-69 (2nd Cir.
15 1983).

16 Plaintiff's representative has submitted evidence of
17 correspondence, dated August 21, 2007, to the Social Security Office
18 requesting copies of the ALJ hearing; a letter from the Social
19 Security office in Falls Church, Virginia, dated August 30, 2007,
20 acknowledging the representative's request for material and sending
21 a CD of the hearing; a cover letter addressed to the local Social
22 Security office, dated September 4, 2007; a Request for Review,
23 dated September 4, 2007, signed by Plaintiff; and a sworn affidavit
24 from the representative's paralegal Robin Franz, that the Request
25 for Review was deposited in the U.S. mail on September 4, 2007.
26 (Ct. Rec. 16.)

27 Defendant neither addresses the applicability of the common law
28 mailbox rule to this case, nor does he controvert Plaintiff's

1 evidence of mailing the Request for Review on September 4, 2007. He
2 does not dispute Plaintiff's assertion that the proffered evidence
3 of timely mailing satisfies the filing requirement, and he does not
4 offer sufficient evidence to rebut the presumption of delivery and
5 receipt. Applying the undisputed mailbox rule, the evidence before
6 this court establishes Plaintiff timely filed his Request for Review
7 by mailing. *Anderson*, 966 F.2d at 492.

8 **C. Mandamus Jurisdiction**

9 Having established timely filing by mailing, Plaintiff requests
10 the court to remand his case to the Appeals Council for review as
11 required by agency Regulations.¹ (Ct. Rec. 1, 4, 19.) Plaintiff
12 asserts that this court has mandamus jurisdiction to consider his
13 action under 28 U.S.C. § 1361, which provides, "[t]he district
14 courts shall have original jurisdiction of any action in the nature
15 of mandamus to compel an officer or employee of the United States or
16 any agency thereof to perform a duty owed to the plaintiff." Citing
17 *Hironymous v. Bowen*, 800 F.2d 888, 891-93 (9th Cir. 1986), Defendant
18 argues exhaustion of administrative remedies "is also a prerequisite
19 for mandamus action." (Ct. Rec. 18.) Defendant's reliance on this
20 case, however, is misplaced. In *Hironymous*, plaintiff was a Social
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22 ¹ The court notes that Defendant misstates Plaintiff's request
23 for relief as "an immediate determination by this Court of his
24 entitlement to Social Security benefits." (Ct. Rec. 18 at 1.) This
25 is not the case; Plaintiff does not seek an award, but seeks
26 enforcement of an agency regulation authorized by the Social
27 Security Act. This claim is collateral to a claim for benefits. See
28 *Lowry v. Barnhart*, 320 F.3d 1019 (9th Cir. 2003), discussed *infra*.

1 Security claimant seeking substantive review and reversal of a
2 decision of the Commissioner denying his claim for benefits. The
3 court held that Section 405(h) provides the exclusive remedy for
4 review of a substantive claim for benefits, but made the following
5 distinction:

6 Rather than contesting a policy, rule, procedure, or other
7 action of the Secretary, Hironymous is simply challenging
8 an isolated decision of the Secretary interpreting the
9 findings of an ALJ. This is the type of dispute that the
10 second sentence of section 405(h) was intended to "prevent
11 review of . . . save as provided in the [Social Security]
12 Act, which provision is made in § 405(g)."

13 *Hironymous*, 800 F.2d at 892-93 (citing *Weinberger*, 422 U.S. at 757).

14 The *Hironymous* court recognized that mandamus jurisdiction is
15 not foreclosed in actions challenging Congressionally authorized
16 regulations, rules and other actions against the Commissioner. *Id.*
17 at 893 n.4. Where policy or procedure is being contested and an
18 award of benefits is not requested, the claim is collateral to a
19 claim for benefits and jurisdiction may be assumed without
20 exhaustion of administrative remedies. *Id.* at 894; see, e.g., *City*
21 *of New York*, 476 U.S. at 487.

22 As recognized by the court, judicially enforceable duties may
23 be created where agency regulations impose certain procedural
24 requirements. *Lowry*, 320 F.3d at 1022. In *Lowry*, the court held:

25 To be judicially enforceable, a pronouncement must
26 "prescribe substantive rules,--not interpretive rules,
27 general statements of policy or rules of agency
28 organization, procedure or practice," and must have been
29 "promulgated pursuant to a specific statutory grant of
30 authority and in conformance with the procedural
31 requirements imposed by Congress."

32 *Id.*; see also *Dietsch*, 700 F.2d at 868 (district court has mandamus
33 jurisdiction to consider claim that Appeals Council had duty to
34 review after timely filing of request for review). Section 1361 "is

1 an appropriate basis for jurisdiction in an action challenging
2 procedure used in administering social security benefits." *Kildare*,
3 325 F.3d at 1084; *Johnson*, 2 F.3d at 924-25. Mandamus jurisdiction
4 is proper where, as here, a Social Security claimant seeks "to
5 vindicate an interest in procedural regularity." *Powderly v.*
6 *Schweiker*, 704 F.2d 1092, 1095 (9th Cir. 1983) (citing *Ringer v.*
7 *Schweiker*, 697 F.2d 1291 (9th Cir. 1982)). Because Plaintiff is
8 challenging the Appeals Council's failure to follow the agency's
9 substantive Regulation, as published in the Code of Federal
10 Regulations, and is not appealing the ALJ's denial of benefits or
11 other discretionary act, the court may assume mandamus jurisdiction
12 to determine if the Appeals Council failed to perform a duty was
13 owed Plaintiff. *Kildare*, 325 F.3d at 1084; *Johnson*, 2 F.3d at 924;
14 *Hironymous*, 800 F.2d at 890-91; *Dietsch*, 700 F.2d at 868.

15 Mandamus relief, however, is an extraordinary remedy that "is
16 available to compel a federal official to perform a duty only if:
17 (1) the individual's claim is clear and certain, (2) the official's
18 duty is nondiscretionary, ministerial and so plainly prescribed as
19 to be free from doubt, and (3) no other adequate remedy is
20 available." *Kildare*, 325 F.3d at 1084 (*citations omitted*). As
21 discussed above, Plaintiff presents credible and sufficient evidence
22 of timely filing by mailing to raise the rebuttable presumption of
23 receipt by the Social Security Office in Spokane within the
24 requisite 60 days. Defendant has not rebutted the presumption. See
25 *Anderson*, 966 F.2d at 492 ("[t]he district court's conclusion that
26 the government failed to rebut the presumption of delivery is in
27 essence, a credibility determination" and, therefore, reviewable for
28 "clear error"). Plaintiff's claim for relief is clear and certain -

1 he seeks judicial enforcement of a procedural Regulation and
2 requests remand of his case to the Appeals Council for review. The
3 Regulations, which are binding on the Commissioner, clearly
4 establish the Commissioner's non-discretionary duty to review an ALJ
5 decision upon timely filing by a claimant of a Request for Review.
6 Further, Plaintiff has attempted all other avenues of relief, and no
7 other remedy is available to address Plaintiff's procedural claim or
8 enforce his right to review. *Kildare*, 325 F.3d at 1084; *Dietsch*,
9 700 F.2d at 868. Mandamus relief as requested by Plaintiff is
10 warranted.

11 CONCLUSION

12 Plaintiff has provided uncontroverted, credible evidence that
13 his Request for Review was mailed to the local Social Security
14 office on September 4, 2007, within 60 days of the ALJ's unfavorable
15 decision, pursuant to 20 C.F.R. § 404.967. Defendant has not
16 rebutted the presumption that the mailing was received by the Social
17 Security office in the usual time. Therefore, Plaintiff timely
18 filed a request for review as required by 20 C.F.R. § 404.968.
19 District court has mandamus jurisdiction to compel the Appeals
20 Council to perform its non-discretionary duty to review Plaintiff's
21 request after a timely Request for Review. Accordingly,

22 IT IS ORDERED:

- 23 1. Defendant's Motion to Dismiss (**Ct. Rec. 11**) is **DENIED**;
- 24 2. The matter is remanded to the Appeals Council for review
25 pursuant to 20 C.F.R. § 404.967 and .968.
- 26 3. An application for attorney fees may be filed by separate
27 motion.

28 The District Court Executive is directed to file this Order and

1 provide a copy to counsel for Plaintiff and Defendant. The file
2 shall be **CLOSED** and judgment entered for Plaintiff.

3 DATED August 8, 2008.

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5 S/ CYNTHIA IMBROGNO
6 UNITED STATES MAGISTRATE JUDGE
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